A

UPTOWN PROPERTIES SDN BHD

v.

PENTADBIR TANAH WILAYAH PERSEKUTUAN & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
PRASAD SANDOSHAM ABRAHAM J
[SUIT NO: S-21-69-2006]
23 FEBRUARY 2012

C ***LAND LAW:*** *Officers - Issuance of computerised title by Land Administrator - Whether done in accordance with the law - National Land Code s. 5A, 14th Schedule*

LAND LAW: *Officers - Computerised title mistakenly issued - Whether act negligent or done in good faith - Whether statutory protection may be* D *claimed - National Land Code, s. 22*

LAND LAW: *Indefeasibility of title and interests - Computerised title mistakenly issued - Whether title obtained though insufficient instrument - National Land Code, s. 340(2(c)*

E

LAND LAW: *Indefeasibility of title and interests - Title mistakenly obtained through Land Administrator - Insufficient and void instrument - Whether act of Land Administrator ultra vires - Whether necessary to prove bona fide purchaser for value - National Land Code, ss. 5A,* F *340(2)(c) - Federal Constitution, art. 13*

In this land dispute, the land in question was registered in the name of the plaintiff since 1982. In 2005, it was discovered that the land was registered in the name of the 5th defendant, Triscenic Sdn Bhd. It transpired that the first defendant had G issued a computerised title, by virtue of s. 5A of the National Land Code (NLC), in the name of the 4th defendant, Liptown Properties Sdn Bhd, who then transferred it to the 5th defendant who in turn charged it to the 6th defendant, Malaysian Assurance Berhad. It was also discovered that the 4th defendant was a non- H entity and not a company duly registered with the Suruhanjaya Syarikat Malaysia (SSM). The 1st defendant is the Pentadbir Tanah, Wilayah Persekutuan whilst the 2nd and 3rd defendants are the Jawatakuasa Eksekutif Tanah Wilayah Persekutuan and I Kerajaan Malaysia respectively. The 1st defendant admitted the error in the transfer but claimed that the issuance of the computerised title was a genuine mistake. They further claimed protection under s. 22 of the NLC which protects officers from civil suits for acts done in good faith. The plaintiff however claimed

that the transfer of the land to the 5th defendant was by means of an insufficient or void instrument and was therefore defeasible in law.

Held (allowing the plaintiff's claim):

(1) The 1st defendant owed a duty of care to the 5th and 6th defendants to ensure that when searches are made at the Land Registry, they would be acting on accurate information and a properly maintained and accurate Register of titles. (para 28)

(2) In order for the computerised title to be issued pursuant to s. 5A of the NLC, a notice must be sent by the plaintiff to surrender the old title in exchange for the new computerised one. On the facts, there was no evidence to suggest that such notice had been sent. This was in contravention of the 14th schedule to the NLC. (paras 8 & 10)

(3) The issuing of a computerised title to the 4th defendant as a registered proprietor when the original title to the said land continued to be in the possession of the plaintiff was *ultra vires* as it contravened the provisions of the s. 5A of the NLC and 14th Schedule and also s. 340(2)(c) of the NLC. It follows therefore that any instrument executed by the director of the 4th defendant would be void and insufficient *per se*. (para 17)

(4) As a result of the *ultra vires* action of the 1st defendant, there is no necessity to deal with the question of whether the 5th and 6th defendants were *bona fide* purchasers for value. (paras 21 & 32)

(5) The conduct of the officers involved showed a failure to carry out their functions correctly and can hardly be construed to have carried out their duties in good faith. They were therefore disqualified from the protection of s. 22 of the National Land Code. (para 28)

(6) Administrative shortcomings amounting to negligence and breach of duty cannot justify the plaintiff being dispossessed of its interest in the said land and the fact that it had happened was a violation of the plaintiff's constitutional right under art. 13 of the Federal Constitution. (para 30)

Case(s) referred to:

Adorna Properties Sdn Bhd v. Boonsom Boonyanit [2001] 2 CLJ 133 FC ***(not foll)***

M&J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor [1994] 2 BLJ 156 SC ***(refd)***

Pendaftar dan Pemeriksa Kereta-Kereta Motor, Melaka & Ors v. KS South Motor Sdn Bhd [2000] 2 CLJ 573 CA ***(refd)***

Pow Hing & Anor v. Registrar of Titles, Malacca [1980] 1 LNS 120 FC ***(foll)***

Tan Tock Kwee & Anor v. Tey Siew Cha & Anor [1995] 4 CLJ 658 HC ***(refd)***

Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(foll)***

Teh Bee v. K Maruthamuthu [1977] 1 LNS 134 FC ***(refd)***

Toh Huat Khay v. Lim A Chang [2010] 7 CLJ 261 FC ***(refd)***

United Malayan Banking Corporation Bhd v. Syarikat Perumahan Luas Sdn Bhd (No 2) [1988] 3 MLJ 352 ***(refd)***

Legislation referred to:

Federal Constitution, art. 13

National Land Code 1965, ss 5A, 22, 340, 14th Sch

For the plaintiff - Robert Lazar (TT Toi with him); M/s Shearn Delamore & Co

For the 4th defendant - not represented

For the 5th defendant - CF Kuan; M/s RM Abdullah Kuan & Assocs

For the 6th defendant - Felix Raj; M/s Shaikh David Raj

For the 1st - 3rd defendants - Aida Adhha (Rohaizah & Haryati with her); AG's Chambers

[Editor's note: Please see Poh Yang Hong v. Ng Lai Yin & Ors [2010] 8 CLJ 323; [2010] CLJ JT(3) where relevant issues were also addressed by Lee Swee Seng JC.]

Reported by EM Goh

JUDGMENT

Prasad Sandosham Abraham J:

[1] This case involves problems arising out of the computerization of titles and the nightmare that can arise if things go awry. The matter was disposed of after a full trial and I reserved judgment till 31 January 2012 wherein I found for the plaintiff and made the orders that I did.

[2] Let me turn first to the facts of this case. The primary facts of this case remain in the main undisputed. The land in question was registered in the name of the plaintiff and held under Lot 1599 located at the 3rd Mile, New Petaling Road (Old Klang Road). The issue document of title (exh. P1) is found at p. 1 of bundle B. The plaintiff had been the Registered Proprietor of Lot 1599 referred to aforesaid since 21 May 1982 which was vacant land and had never been encumbered at least whilst the plaintiff remained the Registered Proprietor of Lot 1599 (the said land). The issue document of title to the said land namely GM 1270 has been in the possession of the plaintiff and that continues to be the position. In the meanwhile the plaintiff continued to pay the quit rent and receipts were issued to the plaintiff particularly during the period 2001 to 2004. (See bundle B pp. 7, 8, 9, 18 & 19).

[3] The plaintiff continued to be totally unaware of what was transpiring in respect of the said land with the issuing of quit rent receipts in the name of the plaintiff, there was nothing to put the plaintiff on guard that something was amiss.

[4] Sometime in May 2005, when the plaintiff's employee went to the land office to pay the quit rent for that year, the plaintiff was shocked to discover, not only that the quit rent had been paid, but that the said land was registered in the name of the 5th defendant. After making a search and lodging a Police Report, the plaintiff instructed its solicitors to bring a discovery action against the 1st defendant and the following was discovered ie,:

(a) The name of the registered proprietor of the said land had initially been altered on the register to that of the 4th defendant;

(b) The title number was Lot 1599 (the said Land) was GM 2968 & not GM1270;

(c) There was a transfer of the said land from the 4th defendant to the 5th defendant sometime in December 2004;

(d) The register document of title maintained by the 1st defendant still reflects the plaintiff as the registered proprietor of the said land.

(e) The 1st defendant issued a computer printed document of title in Form DK in respect of the said Land purporting to convert the existing document of title GM 1270 to a computer printed document of title.

A (f) The 1st defendant issued GM2968 in the name of the 4th defendant on 25 June 2004.

[5] The said land was transferred by the 4th defendant to the 5th defendant who had charged the same to the 6th defendant
B to finance the purported purchase of the said land.

[6] The plaintiff now finds itself in a position whilst it holds the original issue document of title to the said land by virtue of the duplicate title and the computerized title issued by the 1st defendant, the said land was now registered in the name of the
C 5th defendant and charged to the 6th defendant.

[7] To my mind the pivot of the plaintiff's case is whether when
D the duplicate title was purportedly issued to the 4th defendant was void pursuant to s. 340(2)(c) of the National Land Code and the transfer of the said land to the 5th defendant was by means of an insufficient or void instrument 340(2)(b). For this purpose I set out the relevant section:

E 340. Registration to confer indefeasible title or interest, except in certain circumstances.

(2) The title or interest of any such person or body shall not be indefeasible:

F (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.
G

[8] To better appreciate the argument of the plaintiff on this point, the court will have to examine the events that took place during the computerization exercise carried out by the 1st defendant in respect of the issue of document of title to the said
H land. The 1st defendant introduced a computerized Land Registration System for land titles. Section 5A of the National Land Code was the enabling provision which was brought into force on 1 January 1993. It was introduced by the National Land Code (Amendment Act 1992 [Act 832 of 1992]. Section 5A
I regulated the computerization of the old manual title deeds. The aforesaid s. 5A was to be read together with the 14th Schedule to the National Land Code particular s. 8 of the said schedule which I have reproduced.

5A. Coming into force of the Computerized Land Registration System in any Land Registry.

(1) The Minister may, with the approval of the National Land Council, by notification in the Gazette of the Federation, appoint a date for the coming into force of the Computerized Land Registration System in any land Registry.

(2) For the purposes of subsection (1), the term "Land Registry" means:

(a) in the case of land held or to be held under Registry title, or under the form of qualified title corresponding to Registry title, the office of the Registrar of Titles;

(b) in the case of land held or to be held under Land Office title, or under the form of qualified title corresponding to Land Office title, the office of the Land Administrator.

(3) Upon the coming into force of the Computerized Land Registration System in any Land Registry:

(a) the provisions of the Fourteenth Schedule shall apply; and

(b) the provisions of this Act insofar as they relate to the forms of documents of title, the procedure for the preparation and registration of any document of title, any dealing in land and any entry or endorsement of any note, memorial or memorandum or any correction or cancellation thereof on any document of title shall be read with the modifications, amendments, additions, deletions, substitutions or adaptations as provided in the Fourteenth Schedule.

(4) Except as provided in paragraph (b) of subsection (3), all other provisions of this Act shall remain in force and continue to apply to every document of title, instrument or other document prepared under the Computerized Land Registration System.

[9] It is clear that the aforesaid provision at least from the evidence adduced was not complied with. DW2 Puan Rogayah binti Kadari was put in charge of the pilot project for the computerization of titles. From her evidence it becomes clear how the whole situation arose.

A On 28th November 1977 Puan Rogayah binti Kadari and her staff attended as part of a pilot project she says, to the keying in of details of various titles within the Kuala Lumpur Land Office which at the time were in manual form. See chronology of events at Bundle B page 223. In that process the name of the registered proprietor for Lot 1599 was keyed in as "Liptown Properties Sdn B Bhd" rather than as "Uptown Properties Sdn Bhd" as it should have.

[10] The 1st defendant has admitted there was an error in the inclusion of the name of the 4th defendant on the computerized C issue document of title for the said Land and the position of the 1st defendant was the issue document of title held by the plaintiff was still valid. There never was any evidence to suggest that a notice had been sent to the plaintiff to surrender the old title in exchange for the new computerized title. The computerized title D was to be a title in continuation. I find that the computerized title being issued in the name of the 4th defendant was in contravention of the 14 Schedule of the National Land Code. To compound it further the 4th defendant itself is a non-entity ie, it is not a duly registered company with the Suruhanjaya Syarikat E Malaysia (SSM). (See the evidence of DW4 Mardiana bt Mohd Zain)

Q: Boleh Puan terangkan mengapa terdapat Borang 9 atas nama Syarikat Licin Sdn Bhd tersebut?

F A: Saya telah menyemak di dalam sistem dan rekod SSM, rekod asal dan saya mendapati bagi nombor Syarikat 32315-A terdapat dua Borang 9 iaitu satu atas nama Syarikat Licin Sdn Bhd dan satu lagi di atas nama Liptown Properties Sdn Bhd. Untuk pengetahuan Yang Arif dan pihak tuan puan, mengikut prosedur di SSM, setiap penubuhan sesebuah G syarikat Borang 9 hanya dikeluarkan sekali sahaja. Tetapi apabila saya memeriksa sistem dan dokumen asal yang ada di dalam rekod SSM saya mendapati terdapat dua Borang 9 yang dikeluarkan atas nombor syarikat yang sama tetapi nama syarikat yang tertera adalah berbeza. Saya telah H mengesahkan berlaku tipuan di dalam penubuhan syarikat di mana Syarikat Licin Sdn Bhd adalah merupakan syarikat asal yang menggunakan nombor pendaftaran syarikat 32315-A. Dan Syarikat Liptown Properties Sdn Bhd telah menggunakan nombor Syarikat Licin Sdn Bhd.

I Q: Sekiranya Puan dirujukkan kembali ke Bundle D muka surat 1 dan muka surat 27 tersebut, boleh Puan terangkan kedua-dua Borang 9 yang ada berdasarkan pernyataan jawapan Puan sebentar tadi? Muka surat 1 Borang 9 yang atas nama Liptown dan juga muka surat 27 Borang 9 yang tertera nama

Syarikat Licin Sdn Bhd, berdasarkan jawapan Puan sebentar tadi. Boleh Puan terangkan kepada Mahkamah tentang kedua-dua Borang 9 tersebut?

A: Mengikut muka surat 1 Borang 9 iaitu nombor syarikat 32315-A adalah untuk Syarikat Liptown Properties Sdn Bhd tetapi merujuk kepada muka surat 27, Borang 9 nombor syarikat yang sama iaitu 32315-A adalah untuk perakuan perbadanan syarikat sendirian bagi Syarikat Licin Sdn Bhd.

Q: Saya rujuk Puan kepada Borang 9 yang kita rujuk sebentar tadi. Boleh Puan jelaskan kenyataan Puan sebentar tadi?

A: Saya mengesahkan Borang 9 bagi Syarikat 32315-A adalah untuk Syarikat Licin Sdn Bhd dan bukan Liptown Properties Sdn Bhd ini kerana berdasarkan Borang 9 pada particular di dalam Borang 9 adalah sama bagi Syarikat Licin Sdn Bhd tetapi berbeza bagi Liptown Properties Sdn Bhd.

[11] In the evidence of DW2 Rogayah binti Kadari:

Q: Tetapi Puan Rogayah terlibat dalam kes ini pada tahun 1997. Itu sahaja yang mengatakan penglibatan Puan Rogayah di mana proses tukar ganti daripada manual kepada hak milik komputer.

A: Ya

Q: Puan Rogayah telah pun memberitahu bahawa penukaran nama daripada Uptown kepada Liptown telah berlaku secara kesilapan itu adalah keterangan Puan Rogayah dalam witness statement ini bukan.

A: Ya

Q: Selepas kejadian ini berlaku bila Puan Rogayah tengok macam mana pertukaran ini berlaku Puan Rogayah ...

A: Sebab huruf "U" instead of dia bulat, dia nampak bentuk macam empat segi. Tengok macam "LI"

Q: Tengok macam "LI"

A: Ya.

Q: Itu adalah keterangan Puan Rogayah?

A: Biar saya beri penerangan. Biasanya kami Pendaftar pada masa dahulu memang very teliti buat conversion, kita akan semak satu persatu. Masa tu tak ada urusniaga on that title hanya satu sahaja dan kerana yang buat tu adalah salah seorang Kerani yang bagus dan berpengalaman. Jadi bila saya tengok dia tulis "Liptown", jadi saya tengok dia verifikasi yang borang hak milik versi kosong adalah "Liptown", sekali imbas sahaja "L", jadi saya terus endorse. Tiada niat untuk ubah. Masa itu saya tengok memang "L".

A Q: Puan Rogayah bersetuju tak di bawah Jadual 14 DHKK itu hanya boleh diberi kepada pemilik asal apabila pemilik asal surrender manual title yang lama?

A: Ya.

B Q: Tetapi dalam kes ini Puan rogayah berkata di jawapan kepada soalan 14 Puan Rogayah ditanya ini;

Adakah dokumen hak milik asal dikembalikan? Iaitu hak milik manual IDT manual. Soalan 14.

A: Sepanjang tempoh penukaran hakmilik ... ya betul.

C Q: Jadi jawapan Puan Rogayah kepada soalan itu adakah dokumen hakmilik asal bila disebut hakmilik asal iaitu hakmilik IDT (issued document of title) manual di dalam sistem yang lama seperti eksibit P1? Tengok pada eksibit P1 Puan Rogayah. Ini adalah hak milik asal

D A: Ya

Question from the Court:

Q: Katalah the old owner, the owner was holding out to the old title, masukkan title tu bawah katil, dia tak guna pada selepas
E computerization untuk five years, and all sudden he want to do something income what is the position of the old title?

A: Valid.

Q: Yang dia pegang, the old title?

F A: Sepatutnya valid.

Counsel for 1st, 2nd and 3rd Defendants:

Q: Puan Rogayah Yang Arif ada bertanya tadi, sekiranya tuan punya tanah mempunyai geran hak milik asal IDT asal pada dia tersimpan lama tidak digunakan, bila dia nak melakukan
G sesuatu ke atas tanah tersebut, geran tanah IDT yang asal tu setelah dia tidak mengetahui tentang sistem komputer yang dijalankan oleh Pejabat Tanah, apa yang terjadi pada IDT yang ada pada dia yang tersimpan lama?

A: Valid.

H Q: Still valid?

A: Still valid unless dia bayar duit cukai tanah every year. Dia bayar cukai tanah, title dia validlah sebab tak ada ... patutnya IDT ... validlah, dia tak ada buat urusan apa-apa. Masih dia
I own tanah dia, masih validlah.

[12] I find that the title or interest of the 4th defendant on being registered as the registered owner of the said land was obtained by means of an void instrument and was unlawfully obtained as it

had been clearly established that there had been a mistake in the entering of the 4th defendant as the registered proprietor of the said land. I find also that the 14th schedule of the National Land Code had not been complied with. That being the case any instrument of transfer and creation of a charge to the 6th defendant would be consequently void or at the very least by way of a insufficient instrument in view of the fact that the 4th defendant is not a company registered with the Suruhanjaya Syarikat Malaysia (SSM) and does not exist as an entity. The court have generally tended to read the phrase void or insufficient instrument interchangeably but his Lordship Haidar bin Mohd Noor J in the case of *Tan Tock Kwee & Anor v. Tey Siew Cha & Anor* [1995] 4 CLJ 658 at p. 659 para [6] held:

> [6] The instruments by which the charges were registered are merely voidable and not void and will remain so until they are declared void by a Court of law. The issue is the meaning of the words "insufficient or void instrument" which the Court opines should be read disjunctively, that is, "insufficient instrument" would be confined to failure to comply with the procedures or formalities laid down by the NLC whereas "void instrument" would, *inter alia*, relate to any prohibition imposed by the NLC or any written law.

[13] In the decision of the Federal Court in *Toh Huat Khay v. Lim A Chang* [2010] 7 CLJ 261; [2010] 4 MLJ 313 where it was held:

> (1) The said land, due to the said restriction in interest endorsed on the document of title pursuant to s. 124(1)(b) of the NLC, could not be transferred by TKC to the Defendant unless TKC as the proprietor had prior to the transfer, applied to the state authority for the striking off or the rescission of the said restriction in interest. The Defendant had not shown that such an application was made by TKC. There was also no evidence to show that the state authority had directed that the said restriction in interest be struck off the document of title or that a note of its rescission be so indorsed on the document of title pursuant to s. 124(3) of the NLC (see para 18).
>
> (2) If at all the state authority had approved the transfer of the said land, the land administrator, pursuant to s. 124(7) of the NLC shall had to sign a memorandum in Form C in accordance with the direction of the state authority and shall present the same, and on the memorial thereof being made, the registrar shall make an entry on the register and issue document of title to the said land and shall note the date

thereof and the authority therefore, and authenticate the same under his hand and seal. These are mandatory statutory requirements under the NLC which have to be adhered to before the said land could be transferred. It could not be assumed or implied that the state authority had complied with s. 124 of the NLC in the instant appeal based merely on the said letter from the director of land and mines (see para 18).

(3) The transfer of the said land by TKC to the Defendant was clearly in breach of the provisions of the NLC. The document of title had yet to be cleansed of the said restriction in interest and without the title being freed of such restriction in interest, the transfer of ownership was incapable for registration. That being the position, the registration of transfer of ownership to the Defendant was not indefeasible since the registration thereof had been obtained by means of an insufficient or void instrument pursuant to s. 340(2)(b) of the NLC (see para 29).

[14] I refer also to the case of *United Malayan Banking Corporation Bhd v. Syarikat Perumahan Luas Sdn Bhd (No. 2)* a decision of His Lordship Edgar Joseph Jr J (as he then was) reported in [1988] 3 MLJ 352 and to his judgment at p. 356 Para B to G left hand column and I quote:

In *Wong Kim Swee v. Tham Hock Cham*, a High Court decision a restriction imposed on the title prohibited dealings with the land for ten years without the written approval of the Collector of Land Revenue. An Agreement for a lease executed in breach of this condition was held to be incapable of registration as being in breach of the Code.

In these circumstances, the charge having been registered in breach of an explicit statutory prohibition imposed on the title to the charged land pursuant to the provisions of s. 120 of the Code, the title or interest of the chargee is defeasible since registration thereof had been obtained by means of an insufficient or void instrument s. 340(2)(b) and also because the Registrar of Titles, in registering the charge, had acted *ultra vires* the powers conferred upon him: s. 340(2)(c). The defence of estoppel accordingly fails since there cannot be an estoppel to evade the plain provisions of a statute: *Fagabandhu v. Radha Krishna*, particularly when as here, the non compliance goes to the root of the thing. In other words, of the terms of a statute are absolute and do not admit of any relaxation or exemption, anything done in contravention thereof, will be *ultra vires* and no person can be stopped from putting forward the contention that what was done was illegal or void: *University of Delhi v. Ashok Kumar Chopra*.

> Accordingly, no Court is at liberty to enforce as valid, that which a statute has declared shall not be valid or can compliance therewith be dispensed with even by consent of the parties or by failure to plead or argue the point at the outset: *Surajmull v. Triton Insurance Co Ltd.*

[15] And finally I refer to the judgment of Ajaib Singh J at first instance in the case of *Teh Bee v. K Maruthamuthu* [1977] 1 LNS 134; [1977] 2 MLJ 7 at p. 10 para. (b) to (d) left hand column and I quote:

> As a matter of public policy clear and obligatory provisions of the National Land code particularly those which provide for the very basis of the powers of the state authority to approve the alienation of state land ought to be given effect and should not be simply sacrificed before the altar of indefeasibility of title. Giving a free hand to those who deal with applications for the alienation of state land, to allow them to disregard the clear and mandatory provisions of the National Land Code and to let them exercise powers which do not exist under the Code just because they may wish to accommodate some particular applicant can result in many adverse effects on the administration in the land registries leading to corrupt practices and gross injustices.

[16] The act of issuing a duplicate computerized title in the name of the 4th defendant which cannot by any stretch of the imagination be a continuation on title. That coupled with the breach of the 14th Schedule to the National Land Code renders the registration of the 4th defendant as proprietor void pursuant to 340(2)(c) of the National Land Code and the instrument of transfer to the 5th defendant was void as a consequence and / or is a insufficient instrument as the 4th defendant had been registered by the 1st defendant as the registered proprietor in contravention of the 14th Schedule to the National Land Code and at any rate the 4th defendant does not exist as a corporate entity. I therefore find for the aforesaid reasons the transfer of the said land to the 5th defendant is liable to be set aside as it is defeasible.

[17] On the upshot the mistake of the 1st, 2nd and 3rd defendants in describing the Registered Proprietor of the said land as the 4th defendant was unlawful, the application for the issue of a duplicate computerized title on the basis the original title was lost and the subsequent issue of a duplicate title was null and void. The issuing of a computerized title to the 4th defendants as a registered proprietor when the original title to the said land continued to be in the possession of the plaintiff was *ultra vires* as

it contravened the provisions of the National Land Code (Amendment Act 1992 (Act 832 of 1992) s. 5A and the 14th Schedule therein and the same was a contravention of s. 340(2)(c) of the National Land Code. It follows therefore any instrument executed by the director of the 4th defendant would be void and insufficient *per se* (see s. 340(2)(b) NLC).

[18] Before I proceed to deal with the specific defences raised by the respective defendants I observe that the landscape of s. 340 of the National Land Code had been overshadowed by the decision of the Federal Court in *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133. To put it simply, a forger or an unscrupulous person obtains registration of title in his favor that any subsequent transfer in favour of a third party so long as he is a purchaser for valuable consideration remains indefeasible. It would follow in our case all the 5th defendant and the 6th defendant would have to do is to plead that they are *bona fide* purchasers for valuable consideration and that would be the end of the matter. The consequences can be quite dire as in our present case as the plaintiff can be in possession of the issue document of title, and yet find like in this case, there has been "theft" of the said land but as far as the 5th defendant is concerned, they pleaded the defence of *bona fide* purchaser for valuable consideration and the position if upheld would be indefeasible.

[19] Thankfully the Federal Court revisited the *Adorna Propert*ies position in the case of *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269. The facts of the case are as follows:

> The appellant was the Registered Proprietor of a certain property in Kuantan, Pahang unknown to the appellant acting under a forged Power of Attorney (PA) the 1st Respondent executed two charges in favour of the bank to secure a loan for the 2nd Respondent. The 2nd Respondent defaulted and the bank demanded repayment. The appellant sought to declare the charges null and void as the PA was forged. The High Court dismissed the appellant's case and held that the bank was protected by Section 340(3) of the National Land Code. The appellant appeal to the Court of Appeal was dismissed by the Court of Appeal. The Federal Court in allowing the appeal held:

Arifin Zakaria CJ (Malaya) (delivering leading the judgment of the court):

> (1) Section 340 NLC introduced into our land law the concept of indefeasibility of title. Indefeasibility can be immediate or deferred. Immediate indefeasibility means that the immediate

registered title or interest of the proprietor or transferee, immediately to the vitiating circumstances, will be conferred statutory protection despite the existence of any vitiating circumstances. In deferred indefeasibility, the indefeasibility only comes to be attached to the title or interest upon a subsequent transfer. Therefore, the difference between immediate and differed indefeasibility hinges on the effect of registration *vis a vis* the title or interest (paras 19, 20 & 21)

(3) The question was whether the proviso following sub-s (3) applied equally to sub-s. 2(b) of s. 340 NLC. A proviso to a subsection would not apply to another subsection. A proviso carves out an exception to the provision immediately preceding the proviso and to no other (See *M/s Gajo Ram v. State of Bihar; Ram Narain Sons Ltd Ass Commr of Sales* - tax). (para 49)

(4) Subsection (3) of s. 340 NLC merely provided that any title or interest which was defeasible by any of the circumstances specified in sub-s. (2) shall continue to be liable to be set aside in the hands of a subsequent holder of such title or interest. That subsection was subject to the following proviso which read "Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchase." The proviso was directed towards the provision of sub-s (3), supported by the use of the words "in this subsection" found therein. The application of the proviso could not be projected into the sphere or ambit of any other provision of s. 340. (paras 50 & 51).

(5) Although sub-s. (3) of s. 340 NLC made reference to sub-s. (2), sub-s.(3) was restricted to subsequent transfers or interests in the land, It did not apply to an immediate transferee of any title or interest in land. Adorna Properties did not fall under the category of subsequent acquirers and therefore could not take advantage of the proviso to sub-s (3). (para 52)

(7) In the present case, the charge instruments were indisputably forged instruments. It followed that the two charges were liable to be set aside under s. 340(2)(b)NLC. The third respondent was the immediate holder of those charges. It could not take advantage of the proviso to s. 340(3). The answer, therefore, to the question posed before the Court - "Whether an acquirer of a registered charge or other interest or title under the National Land

A Code 1965 by means of a forged instrument acquires an immediate indefeasible interest or title" - was answered in the negative. (paras 55, 56 & 57).

I refer to the judgment of His Lordship Tun Zaki Azmi CJ (as he then was) setting out the position in law with regards to s. 340 B of the National Land Code at p. 279 and 280 in paras. 6, 7 & 8 of His judgment which I have set out:

[6] As far as s. 340(1) of the NLC is concerned, A's title to the land is totally indefeasible. In short if A's name appears C on the registration, no one can come and claim for that title. The law will not entertain it at all.

[7] Now comes the next person, B, whose name appears in the register. If it can be shown that the title or interests obtained by B was obtained by fraud or misrepresentation by him or D anyone else to which he was a party or privy then his claim to the title or interest can be defeated. (See s. 340(2)(a) of the NLC). Otherwise B stands in the same position as A.

[8] The situation where it is proved that the registration in B's name was obtained by forgery or by means of an insufficient E or void instrument is the same (See s. 340(2)(b) of the NLC). His title or interest to the land is liable to be set aside by the previous owner who has a good title. In this latter instance, there is no need to show that B was a party or privy to that forgery or to obtaining the title or interest F by a void instrument.

[20] I also refer to the leading judgment of Ariffin Zakaria CJM (as he then was) where he dealt with His usual Adroitness the Development of the Law on s. 340 of the National Land Code, G the advent of *Adorna Properties* case and its impact on deferred defeasibility and the present position of the law and the reaffirmation of the doctrine of deferred defeasibility which has been an integral part of our jurisprudence and I set out paras. (19), (20) (21), (22), (23), (55) & (61) ie, the relevant portions of His Lordship's judgment and I quote: H

[19] Section 340 of the NLC introduced into our land law the concept of indefeasibility of title. This is central to the system of registration of title under the Torrens system. Raja Azlan Shah (as His Royal Highness then was) in *PJTV Denson (M) I Sdn Bhd v. Roxy (M) Sdn Bhd* [1980] 1 LNS 55 observed that the concept of indefeasibility of title is so deeply embedded in our land law that it seems almost trite to restate it. Indefeasibility is defined by the Privy Council in *Fraze v. Walker* [1967] AC 569 at p. 580 to mean:

> The expression not used in the Court itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which registered proprietor enjoys. This conception is central in the system of registration. It does not involve that the registered proprietor is protected against any claim whatsoever; as will be seen later, there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims *in personam*. These are matters not to be overlooked when a total description of his rights is required. But as registered proprietor, and while he remains such, no adverse claim (except as specifically admitted) may be brought against him.

[20] Indefeasibility can be immediate or deferred. The distinction between the two is well explained in para 404 of the *National Land Code, A commentary* (Vol. 2) by Judith Sihombing which reads:

> There are two types of indefeasibility; immediate and deferred. The factor which distinguishes the two is the common law effect given to the instrument even after registration; in addition; in a regime of deferred indefeasibility, the role of registered volunteer might be more relevant than under an immediate indefeasibility system. If after registration has occurred, the system then ignores the substance, form and probity of the instrument used to support the registration, the system is likely that of immediate indefeasibility. Thus, registration has cured and defect in the instrument being registered. If the instrument, despite registration, still has the power to affect the registered interest or estate, the system will probably be that of deferred indefeasibility.

[21] In short, immediate indefeasibility means that the immediate registered title or interest of the proprietor or transferee immediately to the vitiating circumstances will be conferred statutory protection despite the existence of any vitiating circumstances. In the case of deferred indefeasibility, the indefeasibility only comes to be attached to the title or interest upon a subsequent transfer. Thus, the difference between immediate and deferred indefeasibility hinges on the effect of registration *vis a vis* the title or interest.

[22] Before the decision of *Adorna Properties* the prevailing view was that s. 340 of NLC confers deferred indefeasibility as opposed to immediate indefeasibility. This was confirmed by the Federal Court in *Mohammad bin Buyong v. Pemungut*

A *Hasil Tanah Gombak & Others* [1981] 1 LNS 114. This further reinforced by the Supreme Court's decision in *M & J Frozen Food Sdn Bhd & Nor v. Siland Sdn Bhd & Anor* [1994] 2 CLJ 14. There the Supreme Court, comprising of Abdul Hamid Omar LP, Edgar Joseph Jr and Wan Yahya SCJJ held that indefeasibility can be rebutted not only by fraud but also in cases, where registration is obtained by the use of an insufficient or void instrument or where the title or interest is unlawfully acquired.

B

[23] In that case, it was held that failure to comply with the statutory requirements of para (a) and (b) of s. 258 and para (c) of s. 261(1) of the NLC was not just a mere irregularity, but was an illegality which struck at the root of the first respondent's right to be heard. Therefore, the certificate issued by the Senior Assistant Registrar was *ultra vires* the statutory provisions of the NLC and the title was unlawfully acquired by the first appellant. The title of the first appellant was defeasible under s. 340(2)(c) of the NLC and the learned judge had arrived at a correct decision when he made the order for the cancellation of the registration of the transfer.

C

D

E I also quote:

[55] Reverting to the facts of this case, it is not in dispute that the two charges registered in favour of the 3rd respondent were based on void instruments as the relevant Forms 16A were not executed by the appellant. They were executed by the 1st respondent pursuant to a forged PA. Thus, the charge instruments (Form 16A) used in the present case were indisputably void instruments. It follows, therefore, that the two charges in this case are liable to be set aside under s. 340(2)(b) since they are based on void instruments.

F

G I also quote:

[61] We must stress that, the fact that the 3rd respondent acquired the interest in question in good faith for value is not in issue, because once we are satisfied that the charges arose from void instruments, it automatically follows that they are liable to be set aside at the instance of the registered proprietor namely, the appellant.

H

[21] On the facts of our present case the placing of the name of the 4th defendant on the duplicate title issued by the 1st defendant was void as the plaintiff remains the registered proprietor of the said land and also holds the issue document of title, a mistake duly acknowledged by the 1st defendant. It follows

I

in my judgment the issuance of the computerized title in the name of the 4th defendant was in breach of s. 340(2)(c) of the National Land Code and was void. The 4th defendant title was also in breach of s. 340(2)(c) because of a breach of s. 8, Schedule 14th of the National Land Code and to compound matters further, the 4th defendant is not even registered with SSM. It's a breach that strikes at the root of who the proprietor of the said land was. However since the act of issuing the 4th defendant with a duplicate title was unlawful and *ultra vires*, any instrument executed by the 4th defendant in favour of the 5th and 6th defendants as the vendor was a void and an insufficient instrument pursuant to s. 340(2)(b) of the National Land Code and was liable to be set aside under the principle of deferred defeasibility.

[22] I refer to the Supreme Court decision of *M&J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1994] 2 BLJ 156 at to the judgment of Wan Yahaya SCJ (as he then was) p. 165 which I now set out:

> A purchaser of land might fail to obtain a good title in two distinct ways. Firstly, if the title of the vendor is bad. Secondly, even if the vendor has a good title, there might be some invalidating defects in the conveyance or transaction in which the purchaser attempted to obtain the title. These transactions might be void or voidable for a variety of reasons. In the case of a defect in the vendor's title, the common law rule, is that no person can give a better title than he had - *nemo dat quod non habet*. There are, however, important exceptions to this rule, in particular the qualification made under the proviso to s. 340(3) of our National Land Code 1965 where a *bona fide* purchaser for value without notice of the defeasible nature of the vendor's title acquires an immediate indefeasible title. In the case where the vendor's title is good but the instrument which was used by a purchaser for registration is void or voidable, the effect on such registration will only confer on the person in whose name the land is registered, what is usually referred to as deferred indefeasibility, - see Gibbs v. Messer [1891] AC 248. Under this principle, the registration of the insufficient or void instrument can be set aside.
>
> It would appear, however, from the facts in this appeal that the challenge on the indefeasibility of the purchaser's interest could appropriately be dealt with under paragraph (b) and (c) of s. 340(2) of the NLC.

[23] I find the conduct of the officers involved shows a failure to carry out their functions correctly and can hardly be construed to have carried out their duties in good faith. I would echo that

A portion of the judgment of the Federal Court in *Pow Hing & Anor v. Registrar of Titles, Malacca* [1980] 1 LNS 120; [1981] 1 MLJ 155 at pg 160 the judgment of Abdool Cader J at p. 160 and I quote:

> B In tune with the prelude with which we commenced at the outset, we would by way of postlude in restating the message this decision delivers enjoin every official concerned with or involved in exercising powers and duties under the Code and related legislation to regard this judgment as regrettably necessary but solemn caveat, giving warning, loud and clear, against any wanton C disregard or sloppy application of express statutory provisions in the exercise of their functions, and one to be understood, marked and digested as such. We would add that they must strive to be *au fait* with the law they have to administer and should not hesitate in the course of their statutory duties to seek legal advice D whenever necessary from the State Legal Adviser or his confreres and should never put the latter in the invidious and perhaps even an intolerable position they found themselves in these proceedings of having both in the court below and before us to make feeble attempts at *ex post facto* justification for the inexcusable defaults of others on a post *hoc ergo propter hoc* premise, quite apart from E unnecessarily constraining the justly aggrieved to pit themselves in curial combat against the massive and bottomless purse of the State - much to the delight, perhaps, of the legal profession.

[24] I now turn to the defence of the 1st to the 3rd defendants. F The defendants submission and pleadings indicate they had made a mistake but maintain it was a genuine mistake. The thrust of their arguments relate to the issuing of the computerized document of title to the 4th defendant with a new GM No. 2968. The rogues of the piece they claim are the 4th & 5th defendants and G as a fallback position reliance is placed on s. 22 of the National Land Code:

> 22. Protection of officers
>
> No officer appointed under this Part shall be liable to be sued in H any civil court for any act or matter done, or ordered to be done or omitted to be done, by him in good faith and in the intended exercise of any power, or performance of any duty, conferred or imposed on him by or under this Act.

[25] With respect, the issue to be addressed did the 1st I defendant act *ultra vires* in issuing a computerized duplicate title to the said land with a new GM No. 2968 to the 4th defendant and if, the provisions of s. 8 of the 14th the Schedule of the National

Land Code had been adhered to, this problem would not have arisen at all. The mistake that had led to this debacle was the typing in of the 4th defendant in the computer particulars instead of the plaintiff (see the evidence of DW3).

[26] The maintenance of a land registry that is efficient and maintains accurate particulars is a duty that the 1st defendant owes to every member of the public who makes and relies on a search made at the Land Registry maintained by the 1st defendant. If this confidence is jeopardized that could have dire consequences for trade and economic activity in this country.

[27] By analogy I refer to the decision of the Court of Appeal in *Pendaftar dan Pemeriksa Kereta-Kereta Motor, Melaka & Ors v. KS South Motor Sdn Bhd* [2000] 2 CLJ 573, the issues in this case involving the duty of the RIMV to keep a register of vehicles which was proper and accurate. The Court of Appeal held in a leading judgment of Siti Norma Yaakob JCA as she then was and I quote:

> [1] The appellants' argument that there is no duty on them to keep a true a proper register of vehicles registered by them is only tenable if such duty of care is owed to the public at large. This is not the criteria here. The duty to take care sought to be imposed here is owed to an aggrieved party and not to the public at large.
>
> 2(b) It also indicates that the day-today-operations at the registries of the first and second appellants have not been conducted properly or professionally. For that, the first and the second appellants must be made accountable.
>
> [3] The law should be that the registries maintained by the appellants must contain accurate particulars of all vehicles registered by them. This is essential for the good working of the register system as owners of motor vehicles or anybody else involved in the motor trade conduct searches on the registers on payment of a fee, and clearly, a duty to take care must exist in such a case.
>
> [4] It follows that, every particular information recorded in the files of a registered vehicle is a representation that such information is accurate and reliable as the paying public, particularly owners of motor vehicles, would-be purchasers of such vehicles and those involved in the motor trade like the respondent, rely on such information to conduct private and

A commercial transactions. It is this concept of general reliance that imposes a duty on the first and second appellants to take care that all information coming from them are accurate.

[5] It is incorrect for the appellants to maintain that the second appellant was not aware of the purpose of the respondent's visit to the registry, as the act of endorsing the registration book is proof enough that a transfer transaction was afoot. That aside, the second appellant ought to have been aware that the act of transferring the car to the respondent's name may not be the last transaction conducted by the respondent on the car. The possibility of it being transferred by the respondent to a third party by way of a resale is there and, being a car trader, that possibility is real. The incidence of negligence or negligent statement and misrepresentation, in the circumstances, have been proved.

[28] I would hold that the aforesaid principles apply to the 1st defendant in our case and I would hold that the 1st defendant owed a duty of care to the 5th & 6th defendants to ensure that when searches are made at the land registry, they would be acting on accurate information and a properly maintained and accurate register of titles. I also find from the evidence it shows that the 1st defendant had not acted in good faith and will be disqualified from the protection of s. 22 of the National Land Code.

[29] The plaintiff had effectively been deprived of his right to the said land a right provided for under art. 13 of the Federal Constitution, I set out art. 13:

13. Rights to property.

(1) No person shall be deprived of property save in accordance with law.

(2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.

[30] In my judgment, administrative short comings amounting to negligence and breach of duty cannot justify the plaintiff being dispossessed of its interest in the said land and the fact that it has happened is a violation of the plaintiff's constitutional right under art. 13 of the Federal Constitution.

[31] Perhaps in the current climate of the administration of the country and the transformation policy and reforms being carried out by the government, I would be prepared to say that the 1st defendant owed a duty of care to ensure that by its own mistakes

and negligence, the rights of the plaintiff enshrined in art. 13 of the Federal Constitution are not rendered nugatory. This court cannot sit back and allow the plaintiff to be deprived of its land. If not checked a landowner who takes comfort in the document of title he holds, could have his rights be taken away from him "nilly willy". A B

[32] In the light of my finding, I am of the view there was no necessity to deal with the question of *bona fide* purchaser for value.

[33] On that basis I allowed the notice of contribution for the 5th & 6th defendants against the 1st, 2nd & 3rd defendants with damages to be assessed by the Timbalan Pendaftar. It must be shown that the breach of duty of the 1st, 2nd & 3rd defendants owed to the 5th & 6th defendants was the foreseeable cause and causally by itself caused the damages suffered particularly by the 6th defendant. The whole transaction would have to be examined carefully and its short comings particularly the Suruhanjaya Syarikat Malaysia (SSM) in registering a nonexistent company in its registry and the role of the solicitors in this transaction. C D

[34] By this judgment it is hoped that the short comings and irregularities arising in this transaction can be rectified to ensure there isn't a repeat performance of what has happened, the consequence of which would deprive a registered owner of land to his property which for many would have been a struggle to earn and pay for their land. It is hoped that the 1st, 2nd & 3rd defendants will undertake the necessary measures to strengthen their respective registries after consultation with all relevant stakeholders including SSM and the Bar Council and other relevant bodies. E F

[35] For these reasons the court made the following orders: G

(a) The court grants the orders prayed for in prayer (1) to (7), (10) & (11) of the statement of claim against the 1st, 2nd & 3rd defendants only;

(b) The 5th defendant's notice of contribution in encl. 53(b) and 6th defendant's notice contribution in encl. 53(a) against the 1st, 2nd & 3rd defendants for damages is allowed and be assessed and dealt with by the Timbalan Pendaftar of the High Court. H I

(c) Enclosure 53(c) is withdrawn with no orders as to costs.